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Amurthalingam a/l Tamajeeren v Public Prosecutor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44–46–05 OF 2017
COLLIN SEQUERAH J
5 DECEMBER 2017

C *Criminal Procedure — Revision — Revisionary powers — Application to invoke revisionary powers of High Court in respect of decision of magistrates court — Magistrates court refused right to applicant to cross-examine witnesses giving depositions — Whether deponents gave depositions under ss 52(4) or 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* D *— Whether right to cross-examine witnesses arose*

This was an application for the court to invoke, inter alia, its revisionary powers under s 323 of the Criminal Procedure Code ('the CPC') in respect of the decision of the magistrates court in refusing the right to the applicant to E cross-examine witnesses allegedly giving depositions under s 52 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM'). The applicant was charged under s 26A of the ATIPSOM for smuggling of migrants and claimed trial to the charge. Depositions were recorded from certain witnesses at the magistrates court. However, the F applicant objected to these depositions being used at the trial of the applicant. While the applicant's stand was that the depositions were taken pursuant to s 52(4) of the ATIPSOM and therefore there arose a right to cross-examine the witnesses, the respondent on the other hand contended that s 52(4) did not apply. It was the respondent's contention that s 61A of the ATIPSOM applied G instead and that therefore no right to cross-examination arose. The magistrate disagreed with the contention of the applicant and the applicant was denied the right to cross-examine witnesses who gave the depositions. Hence, the present application.

H **Held**, dismissing the application:

(1) The depositions of the deponents seemed to suggest that they were smuggled migrants and not trafficked persons as contended by the applicant. That being the case, the provisions of s 52 of the ATIPSOM I were inapplicable by virtue of s 41A. Furthermore, a perusal of all the depositions taken themselves state on the face of it that they were taken pursuant to s 61A (see para 43).

(2) The respondent had also submitted that the witnesses were persons who could not be found within the meaning of s 61A of the ATIPSOM. In

their affidavit affirmed on 23 August 2017, it was stated that the immigration department had deported 13 of the deponents. These deponents were now persons who could not be found within the meaning of s 61A. The depositions were indeed taken under s 61A and not a case where evidence was recorded on oath pursuant to s 52. There was no right therefore for the applicant to cross-examine (see para 44).

[Bahasa Malaysia summary

Ini adalah permohonan bagi mahkamah membangkitkan kuasa-kuasa semakannya di bawah s 323 Kanun Tatacara Jenayah ('KTJ') berkenaan dengan keputusan mahkamah majistret dalam menafikan pemohon bagi haknya untuk menyoal balas saksi-saksi pendakwaan yang kononnya memberi deposisi di bawah s 52 Akta Antipemerdagangan Orang dan Anti Penyeludupan Migran 2007 ('Akta'). Pemohon dituduh di bawah s 26A Akta atas penyeludupan migran dan memohon dibicarakan bagi pertuduhan tersebut. Deposisi-deposisi ini dicatatkan dari saksi-saksi tertentu di mahkamah majistret. Walau bagaimanapun, pemohon membantah deposisi-deposisi ini daripada digunakan semasa perbicaraan pemohon. Sementara pemohon berpendapat bahawa deposisi-deposisi diambil berdasarkan s 52(4) Akta dan oleh itu timbul hak memeriksa balas saksi, responden sebaliknya berpendapat bahawa s 52(4) tidak terpakai. Responden menghujahkan bahawa s 61A Akta sebaliknya terpakai dan oleh itu, tidak timbul hak pemeriksaan balas. Majistret tidak bersetuju dengan hujahan pemohon dan pemohon dinafikan hak menyiasat saksi yang memberi deposisi. Oleh itu, permohonan ini.

Diputuskan, menolak permohonan:

(1) Deposisi deponen-deponen seolah-olah mencadangkan bahawa mereka adalah migran yang diseludup dan bukan orang yang diperdagangkan seperti yang dihujahkan oleh pemohon. Oleh itu, peruntukan s 52 Akta tidak terpakai berdasarkan s 41A. Tambahan lagi, penelitian semua deposisi yang diambil sendiri oleh mereka, pada dasarnya, menunjukkan kesemuanya diambil menurut s 61A (lihat perenggan 43).

(2) Responden juga telah menghujahkan bahawa saksi-saksi adalah orang yang tidak dikenal pasti dalam maksud s 61A Akta. Dalam afidavit mereka yang disahkan pada 23 Ogos 2017, dinyatakan bahawa Jabatan Imigresen telah menghantar pulang 13 orang pemberi deposisi. Deponen-deponen ini kini orang yang tidak dikenal pasti dalam maksud s 61A. Deposisi ini sememangnya diambil bawah s 61A dan bukan satu kes di mana keterangan telah direkodkan di bawah sumpah menurut s 52. Oleh itu, tidak ada hak untuk pemohon memeriksa balas (lihat perenggan 44).]

Notes

For cases on revision, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3860–3988.

Cases referred to

Gakyah bt Buyong lwn Pendakwa Raya [2016] 9 MLJ 403; [2016] 3 CLJ 919, HC (refd)

Mohd Faudzi bin Othman lwn Pendakwa Raya [2015] MLJU 768; [2015] 1 LNS 1019, HC (refd)

PP v Kulasingam [1974] 2 MLJ 26 (refd)

PP v Shahrulnizam Othman & Ors [2010] MLJU 2228; [2011] 5 CLJ 674, HC (folld)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 26A, 41A, 52, 52(4), 61A, 61A(1)(a), (1)(b), (4), Parts V, VI

Criminal Procedure Code ss 323, 325

Evidence Act 1950

Immigration Act 1959/1963 s 40A

Rules of the High Court 1980

Nur Hayati Omar (Nur Omar Zul Awang & Co) for the applicant.

Safiah bt A Aziz (Deputy Public Prosecutor, Johor State Legal Advisor) for the respondents.

Collin Sequerah J:

INTRODUCTION

[1] This is an application for the court to invoke, inter alia, its revisionary powers under s 323 of the Criminal Procedure Code ('the CPC') in respect of the decision of the Magistrates Court at Kulai in refusing the right to learned counsel for the applicant to cross-examine witnesses allegedly giving depositions under s 52 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) ('the ATIPSOM').

PERTINENT FACTS

[2] The applicant was charged on 22 February 2017 under s 26A of the ATIPSOM for smuggling of migrants and claimed trial to the charge.

[3] Depositions were recorded from certain witnesses at the magistrate court on 2 April 2017, 3 April 2017, 4 April 2017 and 9 April 2017 respectively. Learned counsel for the applicant objected to these depositions being used at the trial of the applicant. Learned counsel for the applicant contended that if

the witnesses were trafficked persons, s 52(4) of the ATIPSOM will apply according to Part V under s 41A of the ATIPSOM with the result that the provisions of the Evidence Act 1950 will apply.

[4] The learned magistrate however, disagreed with the contention of learned counsel for the applicant. As a result, counsel for the applicant was denied the right to cross-examine witnesses who gave the depositions.

CONTENTIONS OF PARTIES

[5] While the applicant's stand was that the depositions were taken pursuant to s 52(4) of the ATIPSOM and therefore there arose a right to cross-examine the witnesses, the respondent's on the other hand contended that s 52(4) did not apply.

[6] It was the respondent's contention that s 61A of the ATIPSOM applied instead and that therefore no right to cross-examination arose.

ISSUES

[7] The main issue to be decided is whether or not in the circumstances of the case, counsel ought to have been given the right to cross-examine the witnesses who gave the deposition.

[8] It is also necessary to determine whether the provisions of s 52 or 61A of the ATIPSOM applied in the circumstances of the case.

REVISIONARY POWERS

[9] At the outset, it is necessary to be reminded that what is sought to be invoked are the revisionary powers of this court pursuant to s 323 of the CPC. The powers of a judge upon revision are contained in s 325 of the CPC which reads:

> 325 Powers of judge on revision
>
> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[10] These powers were also explained by Hashim Yeop Sani J (as he then was) in *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 as follows:

> The powers of the High Court in revision are amply provided under s 325 of the Criminal Procedure Code subject only to sub-ss (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[11] *Mallal's Criminal Procedure* (7th Ed) at p 581 in explaining the difference between appellate and revisional jurisdiction stated:

> In an appeal it is the duty of the appellate court to examine the evidence and come to an independent finding on each issue of fact but a court sitting in revision deals with questions of evidence or disturbs the finding of fact by the lower court only in very exceptional cases, to prevent a miscarriage of justice.

[12] The principle objective then of the revisionary powers of the court is to correct or prevent a miscarriage of justice.

ANALYSIS OF ARGUMENTS AND FINDINGS

[13] Section 52 of the ATIPSOM reads as follows:

> 52 Recording of evidence of trafficked person
>
> (1) Where a criminal prosecution has been instituted against any person for an offence under this act, the Public Prosecutor may make an oral application for the production of the trafficked person before a Sessions Court before which the criminal prosecution has been instituted for the purpose of recording that trafficked person's evidence on oath.
>
> (2) The Sessions Court Judge may, upon such application, issue a summons or order directed to the person in charge of the place of refuge where such trafficked person is placed, or to the enforcement officer who is investigating the circumstances of the case of a trafficked person, requiring him to produce the trafficked person at the time and place specified in the summons or order.
>
> (3) The Sessions Court Judge shall record the evidence of the trafficked person and complete such recording within seven days from the date of the production of that trafficked person before him.
>
> (4) In the course of the recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950.
>
> (5) The Sessions Court Judge shall cause the evidence taken by him to be reduced into writing and, at the end of that writing, shall sign the same.

(6) Notwithstanding anything contained in this act or any other written laws to the contrary, the evidence recorded under this section shall be admissible in evidence in any proceedings under this act and the weight to be attached to such evidence shall be the same as that of a witness who appears and gives evidence in the course of a proceeding.

[14] Section 52 is contained in Part V of the ATIPSOM. Section 41A of the ATIPSOM states as follows:

41A Non-application

This part shall not apply to a smuggled migrant unless such smuggled migrant is a trafficked person.

[15] Section 61A of the ATIPSOM in so far as is relevant, reads:

61A Admissibility of deposition of trafficked person or smuggled migrant who cannot be found

(1) Notwithstanding anything contained in this act and any written law to the contrary, where in any proceeding for an offence under this act a testimony of any person in respect of whom an order of removal from Malaysia has been made by the Director General under section 32 or 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the court, there shall be admissible in evidence before that court any deposition relating to the subject matter of that proceeding made by that person —

(a) in Malaysia before a Session Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or

(b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence.

and any such deposition shall, without further proof, be admitted as prima facie evidence of any fact stated in the deposition.

[16] From a reading of the section, it is apparent that s 52 applies where evidence is recorded from someone who is a trafficked person. In such an event, according to the provisions of sub-s 52(4) the said person shall be examined in accordance with the provisions of the Evidence Act 1950. Section 52 therefore has got nothing to do with the taking of depositions of any person. It is concerned with the recording of a trafficked persons evidence on oath.

[17] A plain reading of s 61A on the other hand, relates to a situation where the deposition taken of a person who is both a smuggled migrant or a trafficked person and whom in respect of which an order of removal from Malaysia has been made by the Director General of Immigration, becomes admissible as prima facie evidence of any fact stated therein. In this case, the respondent

A contended that the persons from whom the depositions were taken were smuggled migrants.

[18] In order therefore to determine whether learned counsel for the applicant has merits in his complaint that he ought to have been accorded the
B right to cross-examination during the course of the taking of the depositions of the witnesses, it is necessary to first determine whether the witnesses were trafficked persons.

C **[19]** Section 2 of the ATIPSOM contains the following definitions:

'smuggled migrant'

means a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants.

D 'trafficked person'

means any person who is the victim or object of an act of trafficking in persons.

[20] The applicant submitted that the witnesses were in fact trafficked
E persons and alluded to the admission made by the respondent's themselves in their affidavit in reply in para 13.

[21] The respondent however, referred to their affidavit in reply affirmed on 18 July 2017 where it was clarified that the phrase of trafficking that was
F previously used was a mere typographical error and confirmed that the deponents were in fact smuggled migrants.

[22] The learned deputy public prosecutor ('DPP') representing the respondent's, cited the following cases, inter alia, *Mohd Faudzi bin Othman lwn*
G *Pendakwa Raya* [2015] MLJU 768; [2015] 1 LNS 1019, *Public Prosecutor v Shahrulnizam Othman & Ors* [2010] MLJU 2228; [2011] 5 CLJ 674 and *Gakyah bt Buyong lwn Pendakwa Raya* [2016] 9 MLJ 403; [2016] 3 CLJ 919 respectively. With the exception of *Gakyah bt Buyong lwn Pendakwa Raya*
H [2016] 9 MLJ 403; [2016] 3 CLJ 919, it was submitted that the other two cases supported their stand that counsel for the applicant had no right to cross-examine the witnesses who gave the depositions.

[23] In *Mohd Faudzi bin Othman v Public Prosecutor*, the issue was whether
I the wording in s 61A(4) of the ATIPSOM allowed the admission of depositions recorded under any other section of the act or any other acts. The court there held that a deposition recorded under s 40A of the Immigration Act 1959/1963 is admissible in evidence in a criminal proceeding under the ATIPSOM.

[24] The court there went on to hold as follows: A

> I observe that a deposition is required to be made before a session court judge or a magistrate if made in Malaysia. I am of the view that such requirement is clearly intended to prevent a deponent from being subjected to harassment or duress when making a deposition. The reason a deposition has to be made before a session court judge or a magistrate is to ensure that justice is administered and accorded to the deponent when making the deposition. Similar considerations apply to depositions made before a consular officer or a judicial officer of a foreign country. B

[25] In *Public Prosecutor v Shahrulnizam Othman & Ors* and *Gakyah Buyong v Public Prosecutor*, the issue was whether s 40A of the Immigration Act 1959/1963 which is in pari materia with s 61A of the ATIPSOM, allowed deponents to be cross-examined in line with the provisions of the Evidence Act 1950. C

[26] In *Public Prosecutor v Shahrulnizam Othman & Ors* it was held that s 40A of the Immigration Act 1959/1963 expressly excluded the operation of both the Evidence Act 1950 and the Rules of the High Court 1980. D

[27] In *Gakyah Buyong v Public Prosecutor*, it was held the said s 40A of the Immigration Act 1959/1963 did not exclude the operation of the Evidence Act 1950 and therefore the deponents could be subject to cross-examination. This case was however, overruled by the Court of Appeal albeit without the benefit of a written judgment. E

[28] It is my observation that the provisions of s 40A of the Immigration Act 1959/1963 is in pari materia with s 61A of the ATIPSOM. F

[29] As alluded to earlier, s 52 and s 61A of the ATIPSOM deal with two very different situations. Section 52 deals with the recording of evidence of trafficked persons. To that end, s 52(4) clearly states that in the course of the recording of evidence of such trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. G

[30] This is a clear intention of the legislature to subject the manner of the recording of the evidence of such person to the provisions of the Evidence Act 1950 and accordingly to accord the right to counsel to the said trafficked persons. H

[31] Section 61A on the other hand, deals with the admissibility of depositions and not with recording of evidence on oath as is the case under s 52. I

[32] The opening words of s 61A namely 'Notwithstanding anything

A contained in this Act and any written law to the contrary', indicates the exclusion of the provisions of the Evidence Act 1950 and hence the right to cross examine.

B **[33]** In that regard I gratefully adopt the following passage in the judgment of Sofian Abd Razak J in *Public Prosecutor v Shahrulnizam Othman & Ors*:

> Upon the reading of s 40A of the Act, the court was of the view that there is no lacuna in the section as it is quite clear that the words 'Notwithstanding anything contained in this Act and any written law to the contrary' explicitly excludes any
C other written laws that is the Evidence Act 1950 and the Rules of High Court 1980 in the application of s 40A. If Parliament had intended that any other provisions in any other written law to the contrary applies to s 40A of the Act, then it would have clearly stated so as it did in s 52(4) of the Anti-Trafficking in Persons Act 2007 where Parliament had intended that in the course of the recording of evidence of the
D trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. I am not prepared to read words into s 40A and interpret it the way learned counsel for the respondents had submitted.

[34] It had earlier been seen that the provision in s 40A of the Immigration
E Act 1959/63 and that in s 61A are in pari materia with each other.

[35] The other material distinction is that s 52 relates to a situation where a criminal prosecution has already been instituted meaning that a person is already charged. Section 61A on the other hand, relates to the taking of a
F deposition that can be taken at any time and even before a charge has been instituted.

[36] It is obvious that the intent of s 61A is to pre-empt a situation where the smuggled or trafficked person may be subject to deportation by virtue of an
G order made by the Director General under the relevant provisions of the Immigration Act 1959/63.

[37] Section 61A(1)(a) and (1)(b) also allows such a deposition to be taken
H in the presence or absence of the person charged with the offence.

[38] The other distinction is that pursuant to s 41A, s 52 does not apply unless the person is a trafficked person. Now, s 52 is contained in the same part as s 41A which is Part V of the ATIPSOM. Section 41A is reproduced
I hereunder as follows:

> 41A Non-application
>
> This part shall not apply to a smuggled migrant unless such smuggled migrant is a trafficked person.

[39] As seen earlier, it is the stand of the respondent that from the depositions taken, the deponents were smuggled migrants and not trafficked persons. They had also explained what was evidently a typographical error in inadvertently referring to the deponents as trafficked persons. I accept the explanation from the respondent in that respect.

[40] In any event, even if the witnesses were trafficked persons, this would not make any difference to the outcome as the depositions were taken pursuant to s 61A which deal with the depositions of both trafficked persons or smuggled migrants.

[41] It is also not without significance that s 52 is housed under Part V of the Act which deals with the 'Care and Protection of Trafficked Persons' whereas s 61A is housed under Part VI which deals with anything of a miscellaneous nature.

[42] This suggests of course that the two provisions are very different in nature from each other and intended to apply to different situations altogether.

[43] The depositions of the deponents seemed to suggest that they were smuggled migrants and not trafficked persons as contended for by the applicant's. That being the case, the provisions of s 52 were inapplicable by virtue of s 41A. Furthermore, a perusal of all the depositions taken themselves state on the face of it that they were taken pursuant to s 61A.

[44] The respondent had also submitted that the witnesses were persons who could not be found within the meaning of s 61A. In their affidavit affirmed on 23 August 2017, it was stated that the Immigration Department had deported 13 of the deponents. The report of the Immigration Department was also attached as exh 'SAA1'. These deponents were now persons who cannot be found within the meaning of s 61A.

[45] I was satisfied therefore that the depositions were indeed taken under s 61A and not a case where evidence was recorded on oath pursuant to s 52. There was no right therefore for the applicant to cross examine.

[46] In the premises, I dismissed the application of the applicant.

Application dismissed.

Reported by Afiq Mohamad Noor